IN THE

Supreme Court of the United States

MAY 6 1968
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1967

No. 1295

NORTH AMERICAN VAN LINES, INC.,
Appellant,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal From the United States District Court
for the Northern District of Indiana,
Forth Wayne Division

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, Smyth Overseas Van Lines, Inc., Alaska Van & Storage Co., Inc., and Air Van Lines, Inc., Intervening Appellees in the proceedings below, jointly move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a judgment of a three-judge District Court (JS1c-12c) unanimously dismissing Appellant's suit to set aside the order of the Interstate Commerce Commission denying Appellant's request that the Commission find that its Alaska "grandfather" certificate No. MC-107012 (Sub 30) authorizes motor carrier operations between "points in Alaska" in connection with "land-sea-land" operations (JS 1b-6b).

Historically, there have been two distinct methods of moving household goods traffic to and from Alaska: (1) an all-highway overland service through Canada over the Alcan Highway, and (2) land-sea-land service, comprising three separate segments of a through service (a) between interior points in the contiguous 48 States and Seattle, (b) between Seattle and an Alaska port via ocean carrier under the jurisdiction of the Federal Maritime Commission, and (c) between the Alaska port and an interior Alaska point.

Following Alaska Statehood, Congress enacted the so-called Alaska Grandfather Act to provide for permanent certification, on a "grandfather" basis, of carriers which had conducted Alaska operations prior to Statehood. Congress provided for two types of "grandfather" certification for motor carriers: one where the motor carrier was "...the holder of a certificate authorizing transportation by motor vehicle between places in the United States and the Territory of Alaska, and on August 28, 1958, ...was engaged in the transportation of passengers or property as a common carrier by motor vehicle between places in the United States and places in Alaska...", 49 U.S.C.§ 306(a)(4); and secondly, "where the carrier, on August 28, 1958, was... engaged in the transportation in interstate or foreign commerce of

passengers or property by motor vehicle between places in the Territory of Alaska...", 49 U.S.C. § 306(a)(5).

Appellant duly filed its "grandfather" application under both 49 U.S.C. § 306(a)(4) and § 306(a)(5). A formal hearing was held on this application in 1963 in *Mollerup Van Lines, Inc., Alaska Grandfather Application, et al.*, 95 M.C.C. 338 (1963), in which the Commission granted appellant a "grandfather" certificate under 49 U.S.C. § 306(a)(4) on the basis of its all-highway, overland, motor carrier operations, authorizing transportation "Between points in Alaska, on the one hand, and, on the other, points in the United States, except Alaska and Hawaii", but specifically denied appellant "grandfather" authority "between points in Alaska", under 49 U.S.C. § 306(a)(5).

Three years later, appellant filed a petition requesting a declaratory order from the Interstate Commerce Commission interpreting its Alaska "grandfather" certificate as authorizing both "highway" and "land-sea-land" service. By Order of the Commission (October 6, 1966), affirmed by Division 1, acting as an Appellate Division (March 7, 1967), appellant's requested relief was denied (JS 1b-6b). On appeal to the three-judge District Court below, the Commission's order holding that appellant's Alaska "grandfather" certificate did not authorize transportation "between points in Alaska" in "land-sea-land" service, was unanimously upheld (JS 1c-12c).

ARGUMENT

The question presented by appellant whether it must confine itself to an all-highway operation under its Alaska "grandfather" certificate is a false issue. The decisions below merely require that before anyone can lawfully

transport cargo by road "between points in Alaska" he must obtain the appropriate operating authority from the Interstate Commerce Commission as required by Congress.

The second question raised, *viz.*, whether appellant's certificate was partially revoked by the Commission's declaratory order is directly dependant upon whether appellant's certificate ever authorized it to conduct motor carrier operations between an interior point in Alaska and an Alaska port in connection with land-sea-land service.

We submit that these questions are not of first impression, but were resolved by the Commission contrary to appellant's position in the very proceeding in which the certificate was issued, have been reaffirmed and consistently followed by the Commission ever since, and upheld by the Courts on at least three occasions.

In *Mollerup Van Lines, Inc., Alaska Grandfather Application, et al.*, 95 M.C.C. 338 (1963), *aff'd., Andrews Van Lines, Inc. v. United States*, 240 F. Supp. 763 (D.C. Nebr. 1965), *aff'd. per curiam*, 382 U.S. 67 (1965), the proceeding in which appellant's certificate was granted, the Commission made it perfectly clear that a grant of *overland* authority, such as appellant received, did not include authority to operate "between points in Alaska" in connection with the land-sea-land mode.

In *United Van Lines, Inc., Extension - Alaska*, 99 M.C.C. 331 (1965), *aff'd., Andrews Van Lines, Inc. v. United States*, 259 F. Supp. 468 (D.C. Nebr. 1966), the Commission again made clear that the land-sea-land mode of service required operating authority which read "between points in Alaska".

Lastly, the Court's attention is directed to the judgment of the District Court for the Southern District of Indiana, Indianapolis Division, in *Aero Mayflower Transit Co., Inc. v. United States,* Civil Action No. IP 64-C-605, entered June 15, 1966, *aff'd. per curiam,* 387 U.S. 90 (1967), wherein the decision of the Commission in *Mollerup, supra,* was again upheld.

Three times now the Commission's determination that "land-sea-land" operations are separate and distinct from "overland" operations, and that different operating authority is required for each, has been subjected to Court review. Each time the Commission had been upheld by the reviewing District Court, and twice affirmed by this Court. We submit therefore that the Commission's Order in no way constituted a partial revocation of appellant's Alaska "grandfather" authority since motor carrier operations "between points in Alaska" in connection with land-sea-land service were at no time authorized under its certificate. The decision below therefore does not diminish any certificated operating right appellant ever had.

Since appellant was specifically denied the appropriate authority necessary to perform land-sea-land operations, and appellant's Alaska "grandfather" certificate on its face does not authorize operations "between points in Alaska", the filing of a joint tariff *with itself,* in the dual capacity of a motor and a water carrier, under the guise of "substituted" water for motor service, cannot operate to confer such authority. A tariff is simply a holding out to provide service and carries no implication whatsoever that the service offered is authorized or will be lawful. Nor is appellant correct in asserting (JS-15) that the permissive provisions of Section 216(c) of the Interstate Commerce Act result in the transfer of jurisdiction from the Federal Maritime Commission to the Interstate Commerce

Commission of the entire land-sea-land service between the continental United States and Alaska. Public Law 87-595 (76 Stat. 397), authorizing the voluntary establishment by motor carriers of joint rates with *other* carriers, including water common carriers subject to the Shipping Act, 1916, neither expressly nor impliedly revokes the Alaska Grandfather statute above-cited from which appellant derived its certificate, nor Section 27(b) of the Alaska Statehood Act which reserved to the Federal Maritime Commission exclusive jurisdiction over transportation on the high seas between the continental United States and Alaska (72 Stat. 33), nor 49 U.S.C.A. § 903(e)(3) which specifically subjects motor carriers operating as water carriers to and from Alaska to the jurisdiction of the Federal Maritime Commission.

Appellant's reliance on a "substituted service" concept fails because it holds no operating authority between an Alaskan interior point and an Alaskan port, and therefore it cannot substitute another service at a point to or from which it cannot lawfully operate, *Gilbert Carrier Corp. Extension - Kearny, N.J.*, 72 M.C.C. 204. Nor can appellant substitute a service which is not also subject to the jurisdiction of the Interstate Commerce Commission. *Substituted Freight Service*, 232 I.C.C. 683. See also *United, supra.* Appellant's attempt to support its mistaken "substituted service" theory by the quotation of isolated language from this Court's decision in *Atchison, Topeka & Santa Fe Railway v. United States*, 387 U.S. 397, is unavailing since nowhere does this decision suggest that *Mollerup, Andrews, United* and *Aero Mayflower, supra,* are reversed.

The decisions below are clearly supported by the applicable law.

CONCLUSION

It is respectfully submitted that neither question raised by appellant warrants plenary consideration of this Court. The judgment of the District Court should be affirmed.

Respectfully submitted,

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